

ADAM BRAVERMAN
United States Attorney
DIANNE M. SCHWEINER
Assistant U.S. Attorney
Cal. State Bar No. 188013
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 546-7654
Facsimile: (619) 546-7751
Email: dianne.schweiner@usdoj.gov

Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF VALERIA
TACHIQUIN ALVARADO, *et al.*,

Plaintiffs,

vs.

JUSTIN CRAIG TACKETT, *et al.*,

Defendants.

Case No.: 13cv1202-W (JMA)

MOTION TO STRIKE PLAINTIFFS'
SECOND UNAUTHORIZED
SUR-REPLY [ECF NO. 146] FILED
IN CONNECTION WITH DEFENDANT
UNITED STATES' MOTION FOR
SUMMARY JUDGMENT

HRG DATE: March 5, 2018

CTRM: 3C (Schwartz)

JUDGE: Hon. Thomas J. Whelan

Defendant UNITED STATES respectfully moves to strike Plaintiffs' second Sur-reply filed today in connection with Defendant's pending, and fully briefed, motion for summary judgment.

I.

PROCEDURAL HISTORY

Defendant UNITED STATES filed its motion for summary judgment on December 21, 2017. (ECF No. 124). The Court originally scheduled the hearing date for the motion for February 5, 2018, giving Plaintiffs a month to oppose the motion (until January 22nd).

1 However, Plaintiffs requested a continuance of their opposition brief deadline, asking that
2 they be allowed an additional two weeks to file their opposition on February 6th, instead
3 of January 22nd. Defendants did not oppose Plaintiffs' request and agreed to the filing of
4 a joint motion. (ECF No. 125). The Court subsequently granted Plaintiffs' request for
5 additional time and therefore Plaintiffs had six weeks to research, prepare and file their
6 opposition brief. (ECF No. 126).

7 On the evening their opposition was due, Plaintiffs filed a 40-page opposition brief
8 in violation of the 25-page limit for summary judgment motions. Rather than requesting
9 additional pages from the Court in advance, as required, and rather than alert defense
10 counsel to their plans, Plaintiffs simply filed their 40-page opposition brief simultaneously
11 with an Ex Parte Application to file the additional pages. Plaintiffs did the same with
12 respect to their opposition to Defendant Justin Tackett's motion for summary judgment,
13 i.e. file excessive pages and then seek permission from the Court after-the-fact.

14 On February 15, 2018, the Court issued an Order granting the additional 15-pages
15 to Plaintiffs with respect to the motion filed by the United States, and granting Plaintiffs
16 additional pages with respect to Justin Tackett's motion. (ECF No. 136). But the Court
17 noted in its Order that Plaintiffs' briefs were "noncompliant" and that they "sought leave
18 of Court to deviate from the page limits of this district on a retroactive basis." *Id.* The
19 Court further noted that:

20 Despite Judge Whelan's Chambers Rule 5(a)'s requirement that "All ex parte
21 applications shall be accompanied by a declaration from counsel documenting
22 (1) efforts to contact opposing counsel, (2) counsel's meet and confer efforts
23 and (3) opposing counsel's position regarding the ex parte application[.]" no
efforts at a meet-and-confer process or any informal resolution are evident
from Plaintiffs' applications. *Id.*

24 On February 23, 2018, Plaintiffs filed a 38-page Sur-Reply (ECF No. 143), without
25 seeking leave of Court, and without any notice or warning to defense counsel. Defense
26 counsel filed a Motion to Strike that document, and Plaintiffs' counsel subsequently
27 withdrew it and filed another Sur-Reply instead. As with the first Sur-Reply, there is
28 nothing contained in Plaintiffs' brief filed today that could not have been cited or raised in

1 Plaintiffs' initial 40-page opposition brief. The cases cited in Plaintiffs' latest Sur-Reply
2 were issued between 1952 and 1992, and do not constitute new authority.¹

3 Sur-replies are not allowed without leave of court. *See Banga v. First USA, NA*, 29
4 F. Supp. 3d 1270 (N.D. Cal. 2014) (court finding that "granting Plaintiff leave to file a sur-
5 reply is not warranted....[Defendant] did not raise a new legal argument or present new
6 evidence in its reply brief....Accordingly, Plaintiff's motion for leave to file a sur-reply is
7 DENIED"); *Forte v. County of Merced*, 2012 U.S. Dist. LEXIS 3529, 2012 WL 94332
8 (E.D. Cal. 2012) (motion to file sur-reply to the reply denied as without merit); *Singh v.*
9 *United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 2121, 2014 WL 67254 (E.D.
10 Cal. 2014) (holding "there is no provision in the Court's Local Rules permitting Plaintiff
11 to file a sur-reply....To the extent Plaintiff's request for leave to file contains the sur-reply
12 he wishes the Court to consider, his request should be DENIED and the sur-reply should
13 be STRICKEN"); *Garces v. Degadeo*, 2008 U.S. Dist. LEXIS 36603, 2008 WL 1970654,
14 *1 (E.D. Cal. 2008) (holding because a party may not file a sur-reply without leave of court
15 and plaintiff never obtained such leave, the Court has the authority to strike or disregard
16 the sur-reply); *Pfizer v. Beneficial California, Inc.*, 2010 U.S. Dist. LEXIS 82796, 2010
17 WL 3220122, *3 (E.D. Cal. 2010) (court striking Sur-reply reasoning that "if plaintiff
18 wished to file a surreply . . . , it was incumbent upon her to do so in compliance with Local
19 Rules and the Federal Rules of Civil Procedure").

20 Defendant notes that this is a regular pattern practiced by the Law Offices of Iredale
21 & Yoo wherein they consistently file opposition briefs in excess of the required page
22 limitations, along with an after-the-fact ex parte application requesting leave of court after
23 they have already violated the rule and filed the excess pages. This practice puts both the
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25 ¹ Plaintiffs also mislead this Court by labeling their Sur-reply as a "Notice of
26 Supplemental Authority," even though such pleadings are meant for instances where new
27 case law has been issued by higher-level Courts after the filing of a particular motion which
28 directly alters the issues raised in the motion. No new or relevant law relating to this motion
has been issued by any Court since the filing of Plaintiffs' opposition brief on February 6,
2018, nor have Plaintiffs cited to any new authority in either of their Sur-replies.

1 Court and opposing counsel in a bind each time, as the filings have already occurred, are
 2 already docketed in the record, and they require additional time and resources for the Court
 3 and counsel to respond. Although it is evident that Plaintiffs' counsel lives by the motto
 4 that it is "easier to request forgiveness later than to ask for permission in advance," their
 5 continual disregard for the Court's rules and deadlines with respect to page limits and ex
 6 parte applications is prejudicial to the defense. For these reasons, Defendant moves to
 7 strike from the docket Plaintiffs' second Sur-reply (ECF No. 146) and requests that the
 8 Court rule on the pleadings as fully briefed earlier last week.

9 II.

10 **WELL-ESTABLISHED AUTHORITY ALLOWS** 11 **THE COURT TO STRIKE PLAINTIFFS' SUR-REPLY**

12 Civil Local Rule 7.1(h) provides "Briefs or memoranda in support of or in opposition
 13 to all motions noticed for the same motion day must not exceed a total of twenty-five (25)
 14 pages in length, per party, for all such motions without leave of the judge who will hear
 15 the motion." *Id.* Additionally, this Court's initial Scheduling Order in this case provided:

16 Briefs or memoranda in support of or in opposition to any pending motion
 17 shall not exceed twenty-five (25) pages in length without leave of the judge
 18 who will hear the motion. Pursuant to Local Rule 7.1.f.3.c, **if an opposing**
 19 **party fails to file opposition papers in the time and manner required by**
 20 **Local Rule 7.1.e.2, that failure may constitute a consent to the granting**
 21 **of a motion or other request for ruling by the Court. . . .** The dates and
 22 times set forth herein will not be modified except for good cause shown.

23 *See* ECF No. 43, ¶¶ 7, 8, and 20 (emphasis in original). *See also* ECF No. 119, ¶¶ 10 and
 24 21, Second Scheduling Order confirming same.

25 Moreover, pursuant to Federal Rule of Civil Procedure 12(f), "the court may strike
 26 from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." The
 27 Court may do so on its own, or on motion made by a party. *Id.* Plaintiffs' Sur-reply filed
 28 today is nothing more than an additional opposition brief which contains redundant
 material that could have been raised (or was raised) in their first opposition filed on
 February 6, 2018. There is no new law issued by any Court since their first opposition
 brief was filed, and there are no new facts pertinent to this shooting that occurred in

1 September 2012.

2 For the foregoing reasons, Defendant respectfully requests that the Court strike ECF
3 No. 146 from the docket in this case, and that the Court not consider this untimely,
4 unauthorized, and prejudicial filing in connection with Defendant's pending and fully
5 briefed motion for summary judgment.

6 DATED: February 26, 2018

ADAM BRAVERMAN
United States Attorney

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8 *s/ Dianne M. Schweiner*
9 DIANNE M. SCHWEINER
Assistant United States Attorneys
Attorneys for Defendant
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